

# The Right to Journalistic Expression in the European Union

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It comes as no surprise that events in recent years have given rise to many a debate about issues regarding the limitations and restrictions of the right to freedom of expression in the light of media freedom, considering the therewith associated consequences of fundamental human right violations.

The right to freedom of expression has been established as a general principle by many international instruments, such as the Universal Declaration of Human Rights in Article 19, the UN International Covenant on Civil and Political Rights in Article 19, and the EU Charter of Fundamental Rights, which in Article 11 secures the status of the right to freedom of expression and information as a fundamental EU right with binding effect, according to which:

*"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

*2. The freedom and pluralism of the media shall be respected."*

From this it is derived that the right to freedom of expression has a two-fold character. It provides the individual with the right to freely hold and express their opinion and impart information, whilst also equipping the press, in its traditional print and audiovisual but also online form, with the "guarantees appropriate to an institution inherent to the democratic process"<sup>1</sup>, and allows for the press to be established in the role of the "public watchdog".

This duality of its character implies that a violation of the right to freedom of expression affects not only the right of the individual but simultaneously harms society as a whole, as the right constitutes the necessary counterweight to ensure the separation of powers<sup>2</sup> by being utilised in their democratic control, with the media to this extent oftentimes being considered the Fourth Estate.

Media freedom, constituting a more advanced concept of "freedom of the press", due to the rapid development of new platforms available for the mass distribution of information, affords freedom of expression and information its most powerful platform and contributes significantly to the formation of public opinion<sup>3</sup>. Furthermore, it emerges as an important notion not only in relation to the democratisation of societies in general, but also of political institutions and rules in particular<sup>4</sup>, as a society is free only to the degree to which its citizens are informed and can participate in open discussions and public discourse<sup>5</sup>. This notion is further recognised by the European Charter on Freedom of the Press, which prescribes in Article 1: "Freedom of the press is essential to a democratic

<sup>2</sup> Úbeda de Torres, A., *Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights*, Human Rights Brief 10, no. 2 (2003), p. 7.

<sup>3</sup> See Poptcheva, supra note 1.

<sup>4</sup> Calderaro, A. and Dobрева, A., *European Union Competences in Respect of Media Pluralism and Media Freedom*, Centre for Media Pluralism and Media Freedom at the Robert Schuman Centre for Advanced Studies, EUI, RSCAS PP 2013/01, (2003).

<sup>5</sup> Barber, B., *The Conquest of Politics: Liberal Philosophy in Democratic Times*, Princeton, NJ: Princeton University Press, (1989).

<sup>1</sup> Poptcheva, E., *Press freedom in the EU – Legal framework and challenges*, European Parliamentary Research Service Briefing, April 2015.

*society. To uphold and protect it, and to respect its diversity and its political, social and cultural missions, is the mandate of all governments".*

However, it is Article 10 of the European Convention on Human Rights that, corresponding to Article 11 of the Charter, effectively reduces the national sovereignty and the scope of national limitations restricting the right to freedom of expression and information<sup>6</sup>, and allows the protection of media freedom through the enforcement machinery in which the European Court of Human Rights plays a crucial role<sup>7</sup>. Despite the ECtHR not being a body of the European Union, the Court of Justice of the EU gives the ECtHR "special significance" in its case law, and has been interpreting EU legal provisions in the light of the Convention's general principles long before the adherence to them became binding with Article 6 TEU<sup>8</sup>.

Yet, freedom of expression and freedom of the press are not established in the Convention as absolute rights. The Convention itself establishes a specific possible restriction in the form of a licensing regime for broadcasting, television and cinema enterprises in Article 10§1, and allows public authorities to further interfere with the right to freedom of expression by way of formalities, conditions and even penalties. Furthermore, through the case law of the ECtHR, it has been made abundantly clear that the prohibition, restriction or sanctioning of the use of the right to freedom of expression and the right to access or impart information by national law is only acceptable when the restriction is prescribed by a domestic law that is accessible, foreseeable and precise, is in pursuance of a legitimate aim laid out in Article 10§2 of the Convention<sup>9</sup>, and, most

importantly, is "necessary in a democratic society" for its attainment<sup>10</sup>.

The Court has introduced two key notions assisting and guiding the States in their judgements of to be restricted speech by limiting the extent of a state's power of restriction to being structurally dependent upon the contribution of the speech to a "general interest or public debate" and its character as a declaration of fact or a "value judgement", with the latter being granted almost absolute protection, so long as the opinion put forward was made in good faith and is not devoid of any factual basis<sup>11</sup>.

The Court has, further, reiterated on many occasions that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, as such are the demands of pluralism, tolerance and broadmindedness without which there would be no "democratic society"<sup>12</sup>. As such, even polemic<sup>13</sup> and sarcastic<sup>14</sup> language is to be tolerated in light of the right to exaggeration and provocation as an inherent component of political discourse<sup>15</sup>, as an open, pluralistic and democratic society by itself is the most effective, if not the only, guarantor of respect for civil, political, cultural and social rights and freedoms<sup>16</sup>. Nevertheless, the Court did establish a system of boundaries to the

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*tional security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

<sup>10</sup> *The Sunday Times v United Kingdom*, no. 12166/87 ECHR 1991.

<sup>11</sup> Flauss, J., *The European Court of Human Rights and the Freedom of Expression*, Indiana Law Journal: Vol. 84: Iss. 3, Article 3, p. 815, (2009); *Brasilier v France*, no. 71343/01, ECHR 2006.

<sup>12</sup> *Delfi AS v Estonia*, no. 64569/09, ECHR 2015; *Steel and Morris v the United Kingdom*, no. 68416/01 ECHR 2005-II; *Mouvement raëlien suisse v Switzerland*, no. 16354/06, ECHR 2012; *Animal Defenders International v. the United Kingdom*, no. 48876/08, ECHR 2013.

<sup>13</sup> *Lopes Gomes da Silva v Portugal*, no. 37698/97, ECHR 2000-X.

<sup>14</sup> *Katrami v Greece*, no. 19331/05, ECHR 2007.

<sup>15</sup> See Flauss, supra note 11, p. 818.

<sup>16</sup> See Voorhoof, supra note 6.

<sup>6</sup> Voorhoof, D., *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, Centre for Media Pluralism and Media Freedom, EUI, RSCAS 2014/12, (2014).

<sup>7</sup> Harris, D.J., O'Boyle, M., Bates, E.P. and Buckley, M.C., *Law of the European Convention on Human Rights*, Oxford University Press, (2009).

<sup>8</sup> See Poptcheva, supra note 1.

<sup>9</sup> Article 10§2 of the Convention reads: "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of na-*

manner of expression, with the language required to not be by its very nature illicit, solely aimed at sensationalism or leading to the gratuitous insult of others<sup>17</sup>.

Thus, regardless of the opinions expressed, any exceptions to the right of freedom of expression and information must be construed strictly and any restrictions established convincingly<sup>18</sup>. It is necessary to examine whether the reasons for restricting the rights of Article 10 of the Convention are sufficient and pertinent and the measures taken adequate by not being disproportionate to the legitimate aim pursued. In this sense, the Contracting States have a certain margin of appreciation in assessing whether such a "pressing social need", requiring authoritative protection, exists<sup>19</sup>.

Yet, taking into consideration the eminent role of the press in aiding political discourse, an even broader level of protection of journalistic expression is to be granted in comparison to that of the average individual, in the form of inter alia heightened protection of the confidentiality of journalistic sources and the reduction of the reach of journalistic duties, which are not to be restricted only to the traditional media but ought to also encompass individuals engaged in amateur journalistic activity within the scope of the new media<sup>20</sup>, as such are the demands of the very strict interpretation of restrictions to journalistic freedom of expression granted and demanded by the press' contribution to democratic control. As a result, journalists cannot be summoned to divulge their sources and cannot be prosecuted for having revealed information transmitted to them regardless of its protection by law<sup>21</sup>, as "*the right of journalists to not disclose their sources should not be considered as a simple privilege granted to them depending on the legality or illegality of their sources, but as an actual attribute of the right to information*"<sup>22</sup>. Oftentimes, the freedom of journalistic expression reaches as far as to encompass the divulgence of

government secrets, as "*it enables the civil society to control the actions of the Government to which it has entrusted the protection of its interests*"<sup>23</sup>. The Court has, furthermore, emphasised that it "*must exercise caution when the measures taken or actions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern [...] The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident [...] This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals*"<sup>24</sup>.

Nevertheless, even the exorbitant protection of journalistic expression finds its limits in light of the values of the democratic society, with the restrictions of Article 10§2 of the Convention oftentimes being interpreted through the lens of Article 17<sup>25</sup>. To this end, the Court has decided upon the existence of certain clearly established "*notorious historical truths*"<sup>26</sup> the historical revisionism or denial of which do not fall under the protection of Article 10, due to them constituting a substantial threat to public order<sup>27</sup>. Furthermore, language of intolerance or hate speech is also excluded from the protection of Article 10, with the Committee of Ministers of the Council of Europe defining hate speech as "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants, and people of immigrant origin*"<sup>28</sup>. Finally, the Court has established that

<sup>23</sup> See Flauss, supra note 11, p. 834; *Claude-Reyes v Chile*, No 151, Inter-AmCHR 2006.

<sup>24</sup> *Kaperzyński v Poland*, no. 43206/07, ECHR 2012.

<sup>25</sup> Article 17 of the Convention reads: "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*"

<sup>26</sup> As such qualify: the Holocaust, Nazi prosecution of the Jews, the Nuremberg trials, and crimes against humanity committed during World War II.

<sup>27</sup> See Flauss, supra note 11, p. 837; *Garaudy v France*, no. 65831/01, ECHR 2003-IX.

<sup>28</sup> Committee of Ministers, Council of Europe, Recommendation No. R (1997) 20 of the Committee

<sup>17</sup> See Flauss, supra note 11, p. 819; *Klein v Slovakia*, no. 72208/01 ECHR 2006; *Stoll v Switzerland* [GC], no. 69698/01, ECHR 2007.

<sup>18</sup> *The Sunday Times v United Kingdom*, no. 12166/87, ECHR 1991.

<sup>19</sup> See Voorhoof, supra note 6.

<sup>20</sup> See Flauss, supra note 11, p. 827.

<sup>21</sup> See Flauss, supra note 11, p. 828.

<sup>22</sup> *Tillack v. Belgium*, no. 20477/05, ECHR 2007.

whilst direct or indirect incitement to violence does not lead to the ipso facto restriction of the right to freedom of expression, it grants the national authorities more extensive discretionary powers to implement limitations on the exercise of freedom of expression<sup>29</sup>.

Yet, freedom of expression is not the only fundamental right protected by the Convention, and as such is often to be weighed against concurrent or competing rights. In doing so the Court has recognised through its jurisdiction the right of ownership and the protection of religious convictions as concurrent rights enjoying strengthened enforceability<sup>30</sup> in confrontations with the right to freedom of expression. And whilst the Court clearly recognises the precedence of the right of ownership over the right to freedom of expression,<sup>31</sup> it uses two criteria to distinguish lawful from unlawful antireligious speech based on the need to protect the rights of others, by guaranteeing diversity of opinions and belief and preventing dissuasion of believers from expressing their beliefs and exercising their right to freedom of religion<sup>32</sup>. Emanating from these needs are an obligation to avoid gratuitously offensive expressions, which do not contribute to any form of public debate capable of furthering progress in human affairs<sup>33</sup>, and the intolerance of injurious attacks made against sacred symbols or objects of religious veneration<sup>34</sup>.

Furthermore, there are also certain concurrent rights, which enjoy limited enforceability. Such are considered to be the right to respect for one's private life and the right to one's reputation. The latter, whilst not expressly guaranteed in the Convention itself, is treated as a component of "protecting the rights of others"<sup>35</sup>, and as such

of Ministers to Member States on "Hate Speech" (1997).

<sup>29</sup> See Flauss, *supra* note 11, p. 841; *Dogan v Turkey*, (No. 3), no. 4119/02, ECHR 2006; *Sürek v Turkey*, no. 24762/94, ECHR 1999-IV; *Zana v Turkey*, no. 18954/91, ECHR 1997-VII.

<sup>30</sup> See Flauss, *supra* note 11, p. 842.

<sup>31</sup> *Appleby v United Kingdom*, no. 44306/98, ECHR 2003-VI.

<sup>32</sup> See Flauss, *supra* note 11, p. 843.

<sup>33</sup> *Giniewski v France*, no. 64016/00, ECHR 2006-I.

<sup>34</sup> *Tatlav v Turkey*, no. 50692/99, ECHR 2006.

<sup>35</sup> See Flauss, *supra* note 11, p. 845.

weighs systematically less when conflicting with the right to freedom of expression, as the right to one's reputation is not "*sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate public concern*"<sup>36</sup>. The right to privacy, on the other hand, can be restricted depending on the contribution the publication or message makes to a debate of general interest<sup>37</sup>. Should no such contribution exist, as is the case in the event of contentious remarks that relate strictly to the private life of a political figure without any connection to their political mandate<sup>38</sup>, as information that strictly concerns the personal domain, precedence will be given to the right to privacy over the right to freedom of expression. However, especially in the case of the processing of personal data by persons engaging in the use of the right of freedom of journalistic expression as a profession, which constitutes the probably greatest tension between concurring rights, Article 9 of Directive 95/46/EC stipulates that Member States are to provide for exemptions or derogations from the provisions of the Directive for the processing of personal data which is solely being carried out for journalistic purposes to the extent that is necessary to reconcile the right to privacy with the rules governing freedom of expression,<sup>39</sup> or in other words only to the extent they are "*necessary for the purpose of balance between fundamental rights*"<sup>40</sup>.

Overall, the right to freedom of expression is one of the most dynamic and multifaceted principles within the jurisdiction of the European Union and its Member States. Especially its emanation as journalistic freedom of expression demands special and broader protection, due to its influence on the formation of public opinion, its furthering of public discourse, and its promotion of democracy and its

<sup>36</sup> *Tidende v Norway*, no. 26132/95, ECHR 2000-IV.

<sup>37</sup> *Von Hannover v Germany*, no. 59320/00, ECHR 2004-VI.

<sup>38</sup> *Tammer v Estonia*, no. 41205/98, ECHR 2001-I.

<sup>39</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>40</sup> Directive 95/46/EC, Recital 37.

values. As a result, it is the dynamic interpretation by the Court of what is to be considered “necessary in a democratic society” alongside the limitation of the “margin of appreciation” that has had a crucial effect on the impact of Article 10 of the Convention on the protection of media freedom in Europe, granting it overall a by far greater protection than most concurring rights. Regardless, certain limitations can be necessary for the protection of society as a whole, and whilst many national authorities, as demonstrated by the considerable

amount of cases brought before the ECtHR, still do not meet the standards set forth in Article 10 of the Convention, it cannot be denied that important steps have been taken towards achieving the protection of media freedom in the EU, and thus driving towards a more transparent democratic society.